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No. 88-1923

In the Supreme Court of the United States

OCTOBER TERM, 1989

CITIZENS OF ILLINOIS, PETITIONERS

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Nuclear Regulatory Commission's decision not to take enforcement action in this case constitutes an action committed to agency discretion by law, and accordingly exempt from judicial review pursuant to the Administrative Procedure Act, 5 U.S.C. 701(a).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A26) is reported at 868 F.2d 223. The decision of the Director of the Office of Nuclear Reactor Regulation of the Nuclear Regulatory Commission (Pet. App. C1-C13) is reported at 25 N.R.C. 121.

JURISDICTION

The judgment of the court of appeals was entered on February 3, 1989. The petition for a writ of certiorari was filed on May 4, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns a decision of the Director of the Office of Nuclear Reactor Regulation of the United States Nuclear Regulatory Commission not to institute enforcement proceedings against the Commonwealth Edison Company (CECo), which holds licenses issued by the NRC to operate several nuclear powered electric generating plants in northern Illinois.

1. Under the Atomic Energy Act of 1954, 42 U.S.C. 2011 *et seq.*, the NRC is authorized to license and regulate the construction and operation of nuclear power plants. See generally 10 C.F.R. Pts. 0-199. Agency regulations that provide for NRC review and enforcement actions to assure compliance with applicable licensing standards permit members of the public to request the NRC to suspend, revoke or modify a license or to take any other appropriate enforcement action (10 C.F.R. 2.206). If the responsible agency Director decides not to take the requested action, he shall, within a reasonable time, inform the requestor, in writing, of the reasons for that decision (10 C.F.R. 2.206(b)). This lawsuit was initiated as a petition filed pursuant to 10 C.F.R. 2.206.

The petition alleged that CECo had violated NRC regulations governing containment leakage testing (see 10 C.F.R. Pt. 50, App. J) at three of its facilities. Pet. App. A5-A8. It requested that CECo be ordered to show cause why the licenses of the three facilities should not be suspended until CECo complied with Commission regulations. On February 10, 1987, the Director of the Office of Nuclear Reactor Regulation issued an opinion denying the petitioners' request. Pet. App. C1-C13.[1] That decision

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[1] He divided petitioners' complaints into three general categories (Pet. App. C2-C3):

> (1) allegations regarding the general methodology associated with [containment integrated leak rate tests], (2) allegations concerning

became the final agency decision on March 10, 1987, when the Commission declined to review it. Pet. App. A4.

2. Petitioners sought review of the agency decision in the court of appeals, asserting that it was arbitrary and capricious. The NRC moved to dismiss on the ground that the decision not to take enforcement action was not reviewable, because it was "committed to agency discretion by law" (5 U.S.C. 701(a)(2)). Petitioners opposed the motion, arguing that the agency's regulations provided sufficient standards for review of the Director's decision.

The court of appeals dismissed the petition for review. It concluded that neither the Atomic Energy Act nor the NRC's regulations provided sufficient standards to overcome the presumption of unreviewability of decisions not to take enforcement action (*Heckler* v. *Chaney*, 470 U.S. 821, 831 (1985)). It also rejected petitioners' claim that the agency had abdicated its responsibilities in declining to take the requested enforcement action.

ARGUMENT

The court of appeals properly dismissed the petition for review. Its decision correctly applies this Court's decision in *Heckler* v. *Chaney, supra*, and is consistent with the decisions of other courts of appeals that have applied that decision to deny reviewability of NRC refusals to take enforcement actions. The petition for a writ of certiorari should therefore be denied.

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the validity of certain [such] tests performed at * * * [a CECo facility], and (3) allegations related to certain computer programs employed by CECo in conducting [certain containment integrated leak rate tests].

The Director explained that the first two categories of complaints had been addressed and rejected in earlier written denials (Pet. App. C3-C6); he then considered and rejected the third (Pet. App. C6-C12).

In *Chaney* this Court noted that the Administrative Procedure Act creates a strong presumption in favor of judicial review of agency action; it provides for such review except when review is precluded by statute, or "agency action is committed to agency discretion by law" (5 U.S.C. 701(a)(2))—for example, when "the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion" (470 U.S. at 830). Statutes authorizing agency action typically establish clear guidelines governing when the action is to be taken. But "[r]efusals to take enforcement steps generally involve precisely the opposite situation, and in that situation we think the presumption is that judicial review is not available" (*id.* at 831). The relevant inquiry is the existence *vel non* of sufficient statutory standards: "the presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers" (*id.* at 832-833).

The court below, like the other courts of appeals that have directly addressed the issue, found that the NRC's decision not to grant relief requested pursuant to Section 2.206 was unreviewable. See *Massachusetts Public Interest Research Group, Inc.* v. *NRC*, 852 F.2d 9 (1st Cir. 1988) (*MassPIRG*); *Safe Energy Coalition* v. *NRC*, 866 F.2d 1473 (D.C. Cir. 1989).[2] All three courts found that the

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[2] In *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 735 n.8 (1985), this Court suggested that the court of appeals on remand might consider whether "Commission denials of § 2.206 petitions are instances of presumptively unreviewable 'agency action' " under *Chaney*, an issue neither briefed nor argued in *Lorion*. Cf. 470 U.S. at 746-752 (Justice Stevens, dissenting on the ground that such denials are unreviewable under *Chaney*). On the remand, the court of appeals upheld the Commission's denial of review without considering the jurisdictional issue (*Lorion* v. *NRC*, 785 F.2d 1038, 1040 (D.C. Cir.

Atomic Energy Act, like the Federal Food, Drug, and Cosmetic Act at issue in *Chaney*, "vests very wide discretion in the agency" (Pet. App. A19). Cf. *MassPIRG*, 852 F.2d at 15; *Safe Energy Coalition*, 866 F.2d at 1478. This conclusion is clearly correct. The Atomic Energy Act authorizes the NRC to "make such studies and investigations, * * * as the Commission may deem necessary or proper to assist it in [the] * * * enforcement of this chapter" (42 U.S.C. 2201(c)) and to "prescribe such regulations or orders as [the Commission] deem[s] necessary" (42 U.S.C. 2201(i)). It further authorizes the Commission to "make, promulgate, issue, rescind, and amend such rules and regulations as may be necessary to carry out the purposes of this chapter." 42 U.S.C. 2201(p). To enforce this scheme, the Commission "may * * * revoke[]" any license, for any one of a generalized list of reasons. 42 U.S.C. 2236(a). Finally, "[w]henever in the judgment of the Commission any person" has violated or will violate the Act, the Attorney General "may" apply for an injunction to halt the violation (42 U.S.C. 2280). The Atomic Energy Act thus commits decisions regarding enforcement to agency discretion, without providing standards to guide judicial review.

1986); it later resolved that issue in *Safe Energy Coalition* v. *NRC*, 866 F.2d 1473 (D.C. Cir. 1989), holding such decisions unreviewable. Compare *Dickinson* v. *Zech*, 846 F.2d 369, 372 (6th Cir. 1988) (finding Director's refusal to grant emergency relief unreviewable, but suggesting that "the fact that the Commission reviews its director's denial of petitions for an abuse of discretion may indicate that there are indeed standards against which a final decision denying the petition may be reviewed by a court"). The *Dickinson* dictum appears to overlook the difference between review by the agency of the actions of its director for conformity with agency policies and priorities and judicial review, which must rest on articulated legal requirements.

The court below, like the First Circuit in *MassPIRG*, 852 F.2d at 16, and the District of Columbia Circuit in *Safe Energy Coalition*, 866 F.2d at 1478, stated that, in appropriate cases, agency regulations may prescribe standards for the exercise of agency discretion in denying petitions for review that would provide a sufficient basis to permit meaningful judicial review of those denials.[3] But like those courts, it also concluded that no such regulations are involved in the case before it. Pet. App. A23-A25; 852 F.2d at 16-17; 866 F.2d at 1478. The court considered both the regulations relating to enforcement proceedings (10 C.F.R. 2.202, 2.206), and those relating to the technical standards for the testing of containments and to the revocation of licenses (10 C.F.R. Pt. 50). Pet. App. A23-A24. It correctly concluded that these regulations "commit total discretion to the NRC on matters of enforcement" (Pet. App. A23)[4], and although the technical regulations "set forth the methodology of containment construction and leak-rate testing[,] they provide no guidelines for the agency to follow in exercising its enforcement powers that we, as a reviewing court, could look to in adjudicating the NRC's decision not to take enforcement action" (*id.* at A24). In short, "[n]othing in the regulations * * * defines *how* the NRC's decision must be reached or mandates what action the NRC must take if it finds that the technical requirements of the regulations have not been met." *Id.* at A24-A25. Accordingly, "the presumption that an agency decision *not* to take enforce-

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[3] The Court in *Chaney* did not address this question. 470 U.S. at 836.

[4] The enforcement regulations simply require the responsible Director to act upon requests for enforcement actions within a reasonable time, and to provide the requestor with a written statement explaining the reasons for a decision not to institute a requested action. 10 C.F.R. 2.206(b).

ment action is an unreviewable action 'committed to agency discretion by law,' 5 U.S.C. § 701(a)(2), has not been rebutted" (*id.* at A25 (citation omitted)).

Finally, the court recognized that courts may review a decision not to take enforcement action where such a decision amounts to an abdication of the agency's statutory responsibility (Pet. App. A25, quoting *MassPIRG*, 852 F.2d at 19; cf. *Safe Energy Coalition*, 866 F.2d at 1477). But here, the Director of the Office of Nuclear Reactor Regulation considered petitioners' claims and, in a written opinion (Pet. App. C1-C13), stated specific reasons for his conclusion that they were without merit. The Commission found it unnecessary to reconsider that conclusion (see Pet. App. A4 n.3). As the court below stated (*id.* at A26), "[t]he record simply is barren of any evidence indicating that the NRC abdicated its statutory responsibilities."

This case provides a striking example of this Court's observation in *Chaney* that an agency decision not to take enforcement action "often involves a complicated balancing of a number of factors which are peculiarly within its expertise." 470 U.S. at 831. Thus, the Director explained his refusal to take enforcement action on the basis of petitioner's objection to certain aspects of computer programs used by CECo in determining the leak rate of nuclear reactor containment vessels by observing that petitioners' claims "appear to evolve from an imprecise understanding of the functions of certain options typically provided for data control in leak test computer codes, a misinterpretation of the information appearing on printouts of data sets and misunderstanding of regulatory requirements and industry guidelines" (Pet. App. C11-C12). The Director also explained that "NRC inspectors carefully scrutinize all aspects of [CECo leak rate] testing and obtain raw data for analysis to independently assess the acceptability of

leak rate test results", and that such reviews have confirmed the reliability of the challenged procedures. *Id.* at C12.

The Director is best qualified to evaluate whether the challenged leak rate test procedures are compatible with the agency's regulations. The Director made this determination following his own independent investigation of the petitioners' complaints, including an inspection of the licensee's testing procedures. On the basis of that investigation, he determined that no violation had occurred. Even if he had determined that there had been a technical violation, the Director is best suited to assess the magnitude of the violation and its relationship to other problems present in the nuclear industry, and to determine whether and to what extent the agency's resources should be allocated to correcting the problem. As this Court noted in *Chaney*, 470 U.S. at 831-832, "[a]n agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities."

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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